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No. 87-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN R. BLANTON and MARK D. FRALEY,

Petitioners,

-v.-

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF AND APPENDIX OF *AMICUS CURIAE* STATE OF NEW JERSEY IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

This case involves a determination of whether, under Nevada state law, the offense of driving while intoxicated constitutes a "serious" offense which entitles a defendant to a trial by jury under the United States Constitution. *Amicus*, the State of New Jersey, has never provided jury trials for drunk driving offenses, either at common law or under statutory prescription. *State v. Rodgers*, 91 N.J.L. 212, 102 A. 433 (E. & A. 1917); *State v. Linnehan*, 197 N.J. Super. 41, 484 A.2d 34 (App. Div. 1984), certif. den. 99 N.J. 236, 491 A.2d 723 (1985); *State v. Zoppi*, 196 N.J. Super. 596, 483 A.2d 844 (Law Div. 1984). Under present law, defendants receive a bench trial in municipal court (court of limited jurisdiction), after which they are entitled to a trial *de novo* on the municipal court record in the Superior Court (court of statewide jurisdiction). N.J. Stat. Ann. § 2A:8-21a (West 1987) (App. A, p. 1a); New Jersey Court Rules 7:6-1 (App. A, p. 15a); 3:23-1 (App. A, p. 13a); 3:23-8 (App. A, p. 13a). Thereafter, a defendant may pursue an appeal as of right to the Appellate Division (intermediate appellate court) and request discretionary review by the New Jersey Supreme Court. New Jersey Court Rules 2:2-3(a)(1) (App. A, p. 12a); 2:12-3a (App. A, p. 13a).

New Jersey's current penalties for third and subsequent violators of the offense of operating a motor vehicle under the influence of intoxicating liquor are comparable to the Nevada penalties being considered by this Court in that they include: a term of incarceration of 180 days,[2] subject

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[1] *Amicus Curiae*, the State of New Jersey, sponsored by its Attorney General, files this brief in support of respondent pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

[2] While the relevant statutory language reads "not less than 180 days," N.J. Stat. Ann. § 39:4-50(a)(3) (App. A, p. 6a), judicial construction and application of this phrase ensure that 180 days is the maximum authorized period. *State v. Ferretti*, 189 N.J. Super. 578, 461 A.2d 193 (Law Div.), *certif. den.* 94 N.J. 606, 468 A.2d 238 (1983).

to reduction by up to ninety days of community service; a $1000 fine; loss of driving privileges for ten years; a motor vehicle insurance surcharge of $1500 per year for three years; an additional $100 surcharge payable to a Drunk Driving Enforcement Fund; and payment of an $80 fee for and screening by the Division of Alcoholism's Intoxicated Driving Programs Unit. N.J. Stat. Ann. §§ 39:4-50(a)(3) (West 1973 & Supp. 1988) (App. A, p. 6a); 39:4-50.8 (West Supp. 1988) (App. A, p. 11a); 17:29A-35b(2) (West 1985 & Supp. 1988) (App. A, p. 3a). Second offenders are subject to potential incarceration of ninety days, two days of which are mandatory; thirty days of community service; between $500 and $1000 fine; and two years' license revocation. N.J. Stat. Ann. § 39:4-50(a)(2) (West 1973 & Supp. 1988) (App. A, p. 6a). First offender penalties include potential incarceration of thirty days; a mandatory term of two consecutive days (at least six hours per day) at an Intoxicated Driver Resource Center; $250 to $400 fine; and loss of license for a period between six months and one year. N.J. Stat. Ann. § 39:4-50(a)(1) (West 1973 & Supp. 1988) (App. A, p. 5a). Surcharges are also applicable to first and second offenders at lower rates. N.J. Stat. Ann. 17:29A-35b(2) (West 1985 & Supp. 1988).

As a result of these potential penalties, and a bar against plea bargaining for drunk driving offenses, New Jersey's municipal courts are facing an ever-increasing caseload of drunk driving prosecutions.[3] Consequently, this Court's ultimate resolution of the case at bar could substantially

[3] The New Jersey Administrative Office of the Courts reports that in 1987, a total of 42,575 drunk driving cases were processed in the municipal courts of New Jersey. Of that number, 8,429 trials were held. There were also 294,121 dispositions of disorderly persons and petty disorderly persons offenses in the municipal courts in 1987; of these dispositions, 50,706 were trials. Finally, the aggregate number of criminal trials for indictable offenses held in New Jersey superior courts in 1987 was 2,050. Of this latter number, in only 174 did defendants waive trial by jury. These figures demonstrate that granting jury trials for drunk driving—let alone for other "petty" offenses—would dramatically increase the number of offenses tried by jury in New Jersey.

affect the enforcement of, and disposition of violators under, the drunk driving law in this State.

Additionally, the maximum punishment for various disorderly persons offenses in New Jersey is currently six months' incarceration, a $1000 fine and a $30 penalty payable to the Violent Crimes Compensation Board. N.J. Stat. Ann. §§ 2C:43-3c (West 1982 & Supp. 1988) (App. A, p. 2a); 2C:43-3.1a(2)(a) (West 1982 & Supp. 1988) (App. A, p. 2a); 2C:43-8 (West 1982) (App. A, p. 2a). Although N.J. Const. (1947) art. 1, para. 10 (App. A, p. 16a) guarantees jury trials for crimes, both statute and case law limit the definition of "crime" to those offenses carrying a maximum term of incarceration in excess of six months. *State v. Owens*, 54 N.J. 153, 254 A.2d. 97 (1969), *cert. denied* 396 U.S. 1021 (1970); N.J. Stat. Ann. § 2C:1-4 (West 1982). Thus, jury trials are not available for these disorderly persons offenses. Notwithstanding petitioners' professed intent to isolate only the offense of driving while intoxicated for purposes of their jury trial demand, it is clear that any decision by this Court compelling a jury trial for any offense—including Nevada's drunk driving offense—carrying a term of incarceration of six months or less would have far-reaching and disruptive implications for the prosecution of a variety of offenses not only in this State, but in many jurisdictions throughout the nation.

New Jersey maintains a strong interest in the efficient and effective administration of its criminal justice system. We therefore join as *amicus* in support of respondent's assertion that petitioners are not entitled to jury trials and urge this Court to affirm the judgment of the court below.

SUMMARY OF ARGUMENT

1. In defining the scope of the Sixth Amendment's right to jury trial, this Court has long recognized that the right

does not extend to "petty" offenses, but is limited to "serious" crimes. Although earlier decisions focused upon the nature of the offense and whether it was indictable at common law, recent opinions—*Duncan v. Louisiana*, 391 U.S. 145 (1968); *Frank v. United States*, 395 U.S. 147 (1969); and *Baldwin v. New York*, 399 U.S. 66 (1970)—have abandoned consideration of these factors in favor of a reliance upon the penalties that might be imposed. Later decisions have interpreted these cases as establishing a bright line between "petty" and "serious" offenses—a line that coincides with the congressional maximum of six months' incarceration for federal petty offenses. The development of this Court's case law therefore evinces a contemporary rule requiring jury trials only for offenses carrying a maximum authorized term of confinement exceeding six months.

2. If it has not already done so, this Court should clearly enunciate a bright line rule which would provide a constitutional right to a jury trial if and only if the maximum authorized term of incarceration exceeds six months. Without a bright line rule, the boundaries of the "petty" offense category will remain ill-defined, and will impede the prosecution of "petty" and "serious" offenses. Consideration of factors other than incarceration render difficult the formulation of a bright line rule; injection of subjective and time-variable factors such as public perception of the seriousness of the offense or other states' classifications of the offense render the "petty" versus "serious" analysis particulary unstable. The maximum term of incarceration is the most reliable indicator of the seriousness with which a state views the offense and should be the only factor relevant to a defendant's right to a jury trial. This Court's case law allowing penalties other than incarceration to be imposed by civil or administrative mechanisms supports a rule excluding consideration of these penalties in determining whether an offense is "petty." Due process limitations upon a state's ability to incarcerate defendants for

failure to pay a fine ensure that legislative bodies will not choose short imprisonments and large fines to avoid jury trials for "serious" offenses and thus support a rule considering only incarceration, and not fines, in the "petty offense" analysis. Problems associated with making mandatory minimum terms relevant for "petty offense" analysis should foreclose deviation from this Court's rule focusing upon the maximum potential, rather than the actual term imposed.

3. Even without a bright line rule focusing upon the maximum term of incarceration, the additional considerations proposed by petitioners do not demonstrate their entitlement to a trial by jury. Drunk driving was not indictable at common law and is not an offense *malum in se*. The existing laws and practices of other jurisdictions with respect to drunk driving establish no clear national consensus concerning the seriousness of this offense.

4. Nevada has a legitimate state interest in not providing jury trials for first-offender drunk drivers. Bench trials are speedy and inexpensive, and fully protect petitioners' constitutional rights. They also help to guarantee speedy trials in the prosecution of all crimes.

LEGAL ARGUMENT

POINT I

THE DEVELOPMENT OF THIS COURT'S CASE LAW EVINCES A CONTEMPORARY RULE REQUIRING JURY TRIALS ONLY FOR OFFENSES CARRYING A MAXIMUM AUTHORIZED TERM OF INCARCERATION EXCEEDING SIX MONTHS.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . ." In defining the scope of the Sixth Amendment's guarantee, this Court has long recognized that the right to trial by jury does not extend

to "petty" offenses but is limited to "serious" crimes.[4] The problem faced by this Court has been "to draw a line in the spectrum of crime, separating petty from serious infractions." *Duncan v. Louisiana*, 391 U.S. 145, 160-161 (1968). While this Court has from time to time considered a variety of factors pertinent to this task, recent developments in this Court's case law evince a contemporary rule requiring jury trials only for offenses carrying a maximum authorized term of confinement exceeding six months.

While the question concerning the exact location of the line between "petty" and "serious" offenses arguably survived the *Duncan* decision, this Court did determine that the crime at issue in *Duncan*, a crime punishable by two years' imprisonment, clearly fell on the "serious" side of the line. *Id.* at 161-162. Two years later, a three member plurality of this Court, referring to Congress's definition of petty offenses, extended the jury trial rule of *Duncan* to any state criminal offense in which the authorized period of confinement exceeded six months. *Baldwin v. New York*, 399 U.S. 66 (1970). The Court's treatment of this issue in *Duncan* and *Baldwin* differed from this Court's analyses in prior cases.

In *Callan v. Wilson*, 127 U.S. 540 (1888), this Court rejected the contention that the right to trial by jury was limited to felonies or crimes punishable by confinement in a penitentiary. *Id.* at 549. *Callan* involved the crime of conspiracy, an offense indictable at common law. Given the status of the offense at common law, the *Callan* Court held that conspiracy could not be prosecuted summarily

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[4] *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *District of Columbia v. Colts*, 282 U.S. 63 (1930); *Natal v. Louisiana*, 139 U.S. 621 (1891); *Callan v. Wilson*, 127 U.S. 540 (1888).

without benefit of trial by jury. *Id.* at 556. The issue surfaced again in *Schick v. United States*, 195 U.S. 65 (1904), which involved a prosecution for violation of a revenue statute. After noting that both the nature of the offense and the authorized punishment indicated only a petty offense, the Court, relying on *Callan*, again emphasized the necessity of evaluating constitutional provisions concerning the right to trial by jury "in the light of the common law." *Schick*, 195 U.S. at 69. Finally, in *District of Columbia v. Colts*, 282 U.S. 63 (1930), this Court determined that since reckless driving was an offense indictable at common law, the accused was entitled to trial by jury.

In *District of Columbia v. Clawans*, 300 U.S. 617 (1937), this Court confronted the issue in the context of an offense not indictable at common law. The defendant in *Clawans* was charged with dealing in secondhand property without a license, an offense punishable by ninety days' imprisonment. *Id.* at 623. Having determined that the offense was not indictable at common law, this Court conceded that an otherwise "trivial" statutory offense may, by virtue of "the severity of the penalty," acquire the status of a "serious" offense entitling the accused to trial by jury. *Id.* at 625. This Court thus turned to the question whether a nonindictable offense may be brought within the realm of crimes for which the accused is entitled to trial by jury solely by virtue of the authorized punishment. *Id.* By reference to the common law, in this case to English and Colonial statutes in existence at the time the Constitution was adopted, this Court discerned that an authorized period of confinement in excess of ninety days was not an uncommon punishment for petty offenses tried summarily. *Id.* at 626-627. In resolving the issue whether a given penalty could elevate an otherwise "petty" offense to the "serious" category, this Court noted:

> [W]e may doubt whether summary trial with punishment of more than six months' imprisonment,

> prescribed by some pre-Revolutionary statutes, is admissible, without concluding that a penalty of ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.
>
> Congress itself, by measuring the punishment in this case in conformity to the commonly accepted standard when the Constitution was adopted, and declaring that it should be applied today unless found to transgress constitutional limitations, has expressed its deliberate judgment that the punishment is not too great to be summarily administered. [*Clawans*, 300 U.S. at 627-628].

In *Duncan*, this Court, continuing the evolving theme of *Clawans*, did not refer to the common law status of the charged offense, but relied exclusively upon the length of the authorized prison term. In other words, this Court declined to determine whether simple battery constituted an indictable offense at common law, observing instead that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not" and noting that the authorized penalty "may be taken 'as a gauge of [the locality's] social and ethical judgments' of the crime in question." *Duncan*, 391 U.S. at 159, 160 (citation omitted).

Frank v. United States, 395 U.S. 147 (1969), echoed the *Duncan* Court's search for an objective benchmark of seriousness. Referring to *Clawans* and *Duncan*, this Court identified the severity of authorized punishment as "[t]he most relevant indication of the seriousness of an offense . . . ." 395 U.S. at 148. Moving in the same direction in *Baldwin*, this Court again did not concern itself with the question whether the crime of "jostling" was an indictable offense at common law, but found the authorized one year

sentence to constitute the most relevant indication of the seriousness of the crime. 399 U.S. at 69. Significantly, the *Baldwin* Court went on to hold that no offense carrying an authorized penalty in excess of six months can be characterized as "petty" for purposes of the right to trial by jury. *Id.* at 73-74. Subsequent decisions of this Court have interpreted *Duncan* and its progeny as establishing a bright line between "petty" and "serious" offenses—a line that coincides with the congressional maximum of six months' imprisonment for federal petty offenses. *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974). *See Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984) (penalty for particular offense provides clearest and most consistent indication of State's interest in arresting individual for a given offense); *Argersinger v. Hamlin*, 407 U.S. 25, 29 (1972).

Three points can be gleaned from the relevant case law. First, perhaps due to the emergence of statutory offenses unknown to the common law, this Court has moved away from assessments of the common law nature of the offense, see *Colts* and *Callan*, as the determinative, or even a relevant factor concerning the right to trial by jury. *See Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *petition for cert. filed* June 13, 1988; *Justiniano Matos v. Gaspar Rodriguez*, 440 F. Supp. 673, 676-677 (D.P.R. 1976). Second, this Court has never deemed an offense "serious" unless it was indictable at common law, or unless it subjected an offender to confinement in excess of six months. Absent at least one of these factors, none of the other considerations which appear to have played a role in the early decisions of this Court has ever been held sufficient to merit a jury trial. *Landry v. Hoepfner*, 840 F.2d at 1209. Third, the maximum authorized period of confinement for any given crime supplies the most accurate indicator of the seriousness with which society regards the offense. Contemporary responses to criminal acts are necessarily subsumed in and accounted for by the max-

imum custodial penalty authorized for a given offense. *Welsh v. Wisconsin* 466 U.S. at 754 n.14; *Duncan v. Louisiana*, 391 U.S. at 160.

This Court should maintain the course charted in its recent cases and apply a bright line rule of six months' incarceration to determine which offenses are "petty" and which offenses are "serious" for purposes of Sixth Amendment jury trial analysis. Even if a rule of this nature is not preordained by this Court's decisional authority, it should now be adopted as the most sensible and workable manner of deciding whether petitioners are entitled to jury trials.

POINT II

THIS COURT SHOULD ENUNCIATE A BRIGHT LINE RULE PROVIDING A RIGHT TO JURY TRIAL ONLY IF THE MAXIMUM AUTHORIZED TERM OF INCARCERATION EXCEEDS SIX MONTHS.

Amicus State of New Jersey urges this Court clearly to enunciate a bright line rule which would provide a constitutional right to a jury trial if and only if the maximum authorized term of incarceration exceeds six months.[5] All other factors, including the maximum authorized fine, the collateral consequences of conviction (including license suspension), factors intrinsic to the proscribed conduct (including whether it was indictable at common law) and statutory requirements for a minimum term of incarceration should be irrelevant. Several policy considerations support the explicit adoption of this bright line rule. The rule, if not compelled by this Court's case law, is certainly consistent with it and logically follows from it.

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[5] However, we support the exception noted in *Duncan v. Louisiana*, 391 U.S. 145, 162 n.35 (1968), for the offense of contempt of court, under which the penalty actually imposed, rather than the maximum authorized penalty, is the determinative factor. That exception and the reasons for it are not generally applicable, and are not germane to this case.

There is a need for a bright line rule. Without it, "the boundaries of the petty offense category . . . [will remain] ill-defined, if not ambulatory." *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). The states' (and the federal government's) interest in prosecuting both "serious" and "petty" offenses is too important to admit uncertainty as to whether a given offense is "serious," thus requiring a jury trial, or "petty," thus subject to "speedy and inexpensive nonjury adjudications." *Baldwin v. New York*, 399 U.S. 66, 73 (1970). Under the various amorphous tests proposed by petitioners, the uncertainty is omnipresent; even this Court's adjudication today that a given offense is "petty" would not necessarily be valid next year if, in the intervening period, the public perception of the seriousness of the offense changed. (Petitioners' brief at 19-20). Without a bright line rule, the distinction between "petty" and "serious" offenses would essentially remain the subjective determination of judges, and friction between the federal and state judiciary (as has occurred in Nevada) would be inevitable. *Compare United States v. Craner*, 652 F.2d 23 (9th Cir. 1981) *and Bronson v. Swinney*, 648 *F. Supp.* 1094 (D. Nev. 1986) *with Blanton v. North Las Vegas Municipal Court*, 103 Nev. 135, 748 P.2d 494 (1987). It is difficult for prosecutors to prosecute if they are uncertain regarding something so elementary as whether a jury is necessary. In this aspect of the law, this Court has noted the wisdom of employing "objective criteria," *Duncan v. Louisiana*, 391 U.S. at 161; a bright line rule meets this goal, and the goal of certainty.

The "most relevant" objective criteria reflecting the seriousness of an offense may be found "in the severity of the maximum authorized penalty." *Baldwin v. New York*, 399 U.S. at 68. Petitioners argue that in examining the "severity of the maximum authorized penalty," courts should consider not only the maximum term of incarceration, but also the authorized fines and collateral consequences (such as license revocation and increases in

automobile insurance costs). It is difficult to establish a bright line rule if penalties other than incarceration are relevant. This, however, is not the primary reason for excluding consideration of penalties other than incarceration.

As a general rule, incarceration is the only penalty for which Sixth Amendment application is mandatory. At their option, legislative bodies may impose other penalties, including restitution, pecuniary penalties and even revocation of professional licenses, by civil or administrative rather than criminal mechanisms, notwithstanding that the proscribed conduct also warrants incarceration and other designated criminal penalties. Pursuant to these civil mechanisms, an administrative, rather than a judicial officer, may properly litigate the issues; a preponderance standard, rather than proof beyond a reasonable doubt, generally suffices; and no right to jury trial arises from the Sixth Amendment. *E.g., Sedima, S.P.R.L., v. Imrex Co.*, 473 U.S. 479, 491 (1985) ("[c]onduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard"); *Steadman v. Securities and Exchange Comm'n*, 450 U.S. 91 (1981) (permanently enjoining petitioner from continuing his profession as an investment advisor and forcing divestment of certain investments; administrative agency properly applied preponderance standard to conclude that petitioner violated federal securities laws); *United States v. Regan*, 232 U.S. 37 (1914) (preponderance standard applied to government's suit seeking $1000 penalty for violation of alien immigration act; Sixth Amendment did not apply, even though act designated conduct as a misdemeanor and also provided for criminal prosecution). *See also* 9 J. Wigmore, *Evidence* § 2498 (Chadbourn rev. 1981); *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 362 n.14 (1986).

In this case, for example, Nevada could have chosen an administrative agency, or numerous noncriminal mecha-

nisms, to determine whether to suspend petitioners' licenses [*Bell v. Burson*, 402 U.S. 535, 542-543 (1971); *Mackey v. Montrym*, 443 U.S. 1 (1979)] and could similarly have imposed alternative penalties (except for incarceration) in some proceeding other than the instant prosecutions for drunk driving. Nevada, and all states, must remain free to "address a major social problem *both* by way of an administrative scheme *and* through penal sanctions" [*New York v. Burger*, 482 U.S. ___, 107 S.Ct. 2636, 2649 (1987)] or by whatever combination is deemed most advisable. Consideration of penalties other than incarceration in the "petty offense" analysis might force Nevada and other State legislatures to opt for civil, rather than criminal penalties as a method for allowing a decrease in the number (and thus the burden) of jury trials while salvaging some measure of protection for the public. In any event, since penalties other than incarceration can fall outside of Sixth Amendment protection, it is illogical to consider these penalties in Sixth Amendment "petty offense" analysis.[6]

With respect to criminal fines, petitioners might respond that there is a distinction between a criminal fine and a civil pecuniary penalty which warrants consideration of the former in gauging the seriousness of an offense. Traditionally, a prosecutor may collect a pecuniary penalty only by execution of a civil judgment, whereas he can collect a fine by threat of incarceration for failure to pay, even

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[6] On a more basic level, *amicus* State of New Jersey suggests that noncustodial consequences of conviction be considered, if ever, only if they arise from State action, *e.g.*, from a statute mandating the consequence. Thus, while petitioners argue consideration of increased automobile insurance costs for a Nevada defendant convicted of drunk driving, it appears that these costs do not result from State action, but merely from insurance companies' perception of enhanced risk. Even if State action is involved (as it is in New Jersey), enhanced costs and other measures of a remedial nature are generally deemed by the enforcing State to be civil, and thus fall outside of Sixth Amendment protections. *See, e.g., Clark v. New Jersey Div. of Motor Vehicles*, 211 N.J. Super. 708, 711, 512 A.2d 588, 589 (App. Div. 1986).

if the failure is blameless because the defendant cannot afford to pay. *Cf. Landry v. Hoepfner*, 840 F.2d 1201, 1216 n.30 (5th Cir. 1988) (en banc). However, this Court's opinion in *Bearden v. Georgia*, 461 U.S. 660 (1983), ensures that a defendant who cannot afford to pay will not be incarcerated for that failure unless other penological alternatives are inadequate; and in any event the aggregate term of incarceration for the offense and for the failure to pay cannot exceed the statutory maximum for the offense (which for petty offenses is six months). The diminishing effectiveness of increasing fines, occasioned by the diminishing class of defendants who can afford to pay them and *Bearden*'s due process limitations upon incarceration for the resulting failure to pay, ensures that legislative bodies will not choose short imprisonments and large fines as a mechanism for avoiding jury trials for offenses they deem serious, and thus supports a rule considering only incarceration, and not fines, to distinguish "petty" from "serious" offenses.

Other tests and factors proposed by petitioners and *amici curiae* national and Nevada chapters of the American Civil Liberties Union (A.C.L.U.) for distinguishing "petty" from "serious" offenses are presumably capable of "bright line" formulation, but are laden with negative consequences. For example, a rule requiring juries for all offenses indictable at common law[7] could presumably be a "bright line" rule, although its application would entail difficulty and differences in opinions among legal scholars. *See, e.g., State v. Maier*, 13 N.J. 235, 251-252, 99 A.2d 21, 30 (1953). In any event, difficulty in application is not the primary reason for excluding consideration of this factor.

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[7] Petitioners acknowledge that "the factor of 'indictable at common law' seems to have been abandoned by this Court" (petitioners' brief at 21) and yet argue that "DWI . . . would clearly have been indictable at common law." *Id.*

"Our Constitution was not intended to consecrate the common law's treatment of any specific misconduct and thus to bar legislative revaluation of it in the light of changing conditions and mores." *State v. Owens*, 54 N.J. 153, 159, 254 A.2d 97, 100 (1969), *cert. denied* 396 U.S. 1021 (1970). A contrary rule would reduce a legislature's incentive to decriminalize or lessen the penalties and consequential stigma for conduct once, but no longer, deemed serious. This would diminish respect for the law, since prosecutors and grand juries are loathe to "stigmatize their fellow citizens as criminals for [what they deem to be] a slight offense," and persons victimized by the offensive (but nevertheless petty) conduct are "without the redress that the law contemplated would be accorded [them]." *State v. Maier*, 13 N.J. at 243, 99 A.2d at 25.[8]

An example of the need for revaluation of conduct indictable under the common law may be found in this Court's opinion in *District of Columbia v. Colts*, 282 U.S. 63 (1930). This Court noted that reckless driving "was an indictable offense at common law. . . when horses, instead of gasoline, constituted the motive power." *Id.* at 73. The Court thus concluded that the vehicular infraction of reckless driving was indictable at common law, *id.*, yet surely the Sixth Amendment does not require every State to afford jury trials for this offense, no matter how trivial the penal consequences.

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[8] Since the founding of our Nation, each of New Jersey's constitutions has guaranteed jury trials for criminal prosecutions. *See State v. Maier*, 13 N.J. at 257-258, 99 A.2d at 34. However, our courts, like this Court, have recognized the "petty" offense exception. Thus, the opinions in *Maier* and *Owens* are particularly instructive. "The majority opinion in *Maier* . . . declined to accept the . . . proposition . . . that the Legislature could not downgrade what was a crime at common law to an offense below the grade of crime and refuse a trial by jury." *State v. Owens*, 54 N.J. at 159, 254 A.2d at 100. The Court in *Owens* refused to reconsider this holding.

Indeed, *amicus* State of New Jersey respectfully suggests that this Court's valuation of the nature of reckless driving fifty-eight years ago in *Colts* has not withstood the test of time. Many jurisdictions today do not treat reckless driving as a "serious" offense. *See State ex rel Dean v. City Court of Tucson*, 141 Ariz. 361, 363, 687 P.2d 369, 371 (Ct. App. 1984)("[W]e do not believe that reckless driving is today considered to be 'an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense.' " (quoting *Colts*)); *Justiniano Matos v. Gaspar Rodriguez*, 440 F. Supp. 673, 677 (D.P.R. 1976) ("At the present day, all men and women travel much more rapidly than was possible in the eighteenth century"). *See generally* Annot. *Reckless Driving as Lesser Included Offense of Driving While Intoxicated or Similar Charge*, 10 A.L.R. 4th 1252 (1981). Petitioners and *amici* A.C.L.U., by invoking the "indictable at common law" test, ignore the dynamic social trends which have ameliorated society's attitudes towards reckless driving, yet purport to rely upon the same dynamic social trends in arguing that society's contemporary condemnation of drunk driving renders it "serious" independent of its penalties.

Petitioners would also have this Court consider how society views the offense, and whether it is *malum in se* or *malum prohibitum*. These social judgments are best left to the legislatures. It is better not to "involve judges in applying the same sort of criteria that the legislative branch did in the first place when it fixed the maximum sentence. Legislatures . . . are far better equipped to perform the task . . . [being] more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect." *Landry v. Hoepfner*, 840 F.2d at 1209. Moreover, it is not useful for a court "to sample popular opinion to determine how much stigma is attributed to each act of misconduct and thereupon to decide, in some way which escapes us, whether

an offense is more than petty notwithstanding the statute has so treated it. It is for the Legislature alone to assay the public's judgment, and the Legislature does so when it prescribes the legal consequences . . . " *State v. Owens*, 54 N.J. at 160, 254 A.2d at 101.

To argue that this Court's case law has mandated consideration of factors other than penalties is to confuse the goal with the means by which it is accomplished. Admittedly, this Court's case law concerning the right to trial by jury has in the past considered factors such as whether the conduct was indictable at common law, but even then the sole purpose was to gauge the seriousness of the offense. Offenses serious in sixteenth century England are not necessarily serious today; and offenses serious in California are not necessarily serious in Arizona. *Rummel v. Estelle*, 445 U.S. 263, 281-282 (1980). "[T]he classification of state crimes differs widely among the states," *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984), and this is entirely proper in our federal system. Thus, "the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's [evaluation of its seriousness]." *Id.* This is therefore the factor which should determine the right to trial by jury.

Finally, petitioners argue that an offense not otherwise "serious" might become so if the statute (like the Nevada drunk driving statute) requires a mandatory minimum jail term. Aside from contempt proceedings, see *supra* note 5, this Court has always hinged its "petty offense" analysis upon the maximum potential term of incarceration, rather than the term actually imposed, and thus an offense carrying a maximum term of six months should be "petty" regardless of statutory requirements for imposition of a minimum term. A statutory requirement for a minimum term "operates solely to limit the sentencing court's discretion in selecting a penalty within the . . ." petty offense range, *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986),

and should not serve to transform an otherwise "petty" offense into one which is "serious."

Injection of custodial minima into the "petty offense" analysis, and the consequential abandonment of the rule hinging that analysis exclusively upon the maximum authorized term, would likely complicate the administration of justice. It could logically compel consideration of related factors such as *de facto* minima or the standard sentencing practices for other offenses. For example, some defendants would inevitably contend that they were entitled to jury trials for a "petty" offense because a given judge or collection of judges routinely imposed a minimum term, and thus established a *de facto* minimum period of incarceration sufficient to render the "petty" offense "serious." Other defendants would contend that a "petty" offense was "serious" because the term routinely imposed for that offense exceeded that for a "serious" offense uniformly drawing probation or a minimal term.

Consideration of mandatory minimum sentences in the "petty offense" analysis would also lead to problems with respect to "petty" offenses which statutorily require minimum terms only upon the judge's finding of certain aggravating factors.[9] *McMillan* held that the Sixth Amendment does not require a jury trial with respect to the existence of these aggravating factors, *id.* at 93, yet petitioners' argument would illogically compel a jury trial with respect to the offense solely because, in a given case, the prosecutor alleges the existence of these aggravating factors and thus seeks the minimum statutory penalty

[9] For example, New Jersey imposes up to 90 days in jail for a person who operates a motor vehicle during a period in which his license was revoked for drunk driving. However, if the court finds as an aggravating factor that the defendant was involved in an accident resulting in injury to another person, then it must impose a statutory minimum of 45 days in jail. N.J. Stat. Ann. § 39:3-40 (West 1973 & Supp. 1988) (App. A, p 4a).

mandated by their existence. All in all, the problems associated with making mandatory terms relevant for purposes of "petty offense" analysis should foreclose deviation from this Court's rule focusing upon the maximum *potential*, rather than *actual* term imposed.

For these several reasons, this Court should clearly enunciate the bright line rule advanced herein and foreclose consideration of extranous factors such as the maximum fine, the public's alleged perception of the seriousness of the offense, whether the offense was indictable at common law, whether it is *malum in se*, and the circumstances under which it might require imposition of a minimum term of incarceration. Nevada's drunk driving statute for first offenders meets this bright line rule; it authorizes no period of incarceration exceeding six months. Thus, petitioners are not entitled to jury trials.

POINT III

TO THE EXTENT THAT FACTORS OTHER THAN THE MAXIMUM TERM OF INCARCERATION ARE RELEVANT, THEY DO NOT ENTITLE PETITIONERS TO TRIAL BY JURY.

In Point II, *amicus* State of New Jersey has advocated application of a bright line rule exclusively focusing on the maximum term of incarceration to determine whether an offense is "petty," or "serious" enough to warrant a trial by jury. Simultaneously, we have attempted to demonstrate the unworkability of considering other factors which petitioners and *amici* A.C.L.U. have culled from this Court's precedent and seek to include in the "serious offense" equation. In this Point, *amicus* State of New Jersey further suggests that, even if any of these additional considerations are relevant, petitioners are not entitled to jury trials because they misapply the tests they proffer.

With respect to the factor of the inherent seriousness of an offense, *amici* A.C.L.U. point to this Court's opinion in *District of Columbia v. Colts*, 282 U.S. 63 (1930), which held that the offense of driving an automobile recklessly so as to endanger property and individuals was *malum in se*, and argue that it would be wholly incongruous to treat driving while intoxicated as *malum prohibitum*. *Amici* A.C.L.U. ignore the fact that in the process of declaring a certain degree of reckless driving to be *malum in se*, this Court in *Colts* specifically considered and implicitly approved the holding in *State v. Rodgers*, 91 N.J.L. 212, 102 A. 433 (E. & A. 1917), which determined that driving while intoxicated was only a petty offense not indictable at common law. *See Landry v. Hoepfner*, 840 F.2d 1201, 1212-1213 (5th Cir. 1988) (en banc). More fundamentally, there is nothing factually or legally inconsistent in placing reckless driving under a different classification from driving while intoxicated. While the concept of recklessness is never suggestive of a benign form of conduct, a person who drives while under the influence does not necessarily endanger the public witn the same degree of immediacy as the reckless driver. *State v. Dively*, 92 N.J. 573, 583, 458 A.2d 502, 507 n.7 (1983) ("Driving while drunk does not necessarily translate into reckless driving. It is possible that a vehicle operated by an inebriated driver is not driven recklessly and obviously there are drivers who are reckless but not drunk."); *State v. Roenicke*, 174 N.J. Super. 513, 517, 417 A.2d 54, 56 (Law Div. 1980) ("The essence of the offense is the impaired condition of defendant's physical coordination or mental faculties rather than the manner in which he is driving").

"Even if an intoxicated person drives his car with utmost care, he can be charged with driving while intoxicated. It is the intoxication, not any outward sign of recklessness, which is the offense." *United States v. Reed*, 617 F. Supp. 792, 798 (D.Md. 1985). According to a study conducted at the University of Colorado, a substantial

number of volunteers undergoing judgment, balance and motor coordination tests performed as well when they were "legally drunk" as when they were sober. Blakeslee, *Scientists Find Key Biological Causes of Alcoholism*, N.Y. Times, Aug. 14, 1984, at C1, col. 1. Therefore, this Court's characterization of reckless driving in *Colts* is not dispositive of whether drunk driving is *malum in se* and does not support the claim that drunk driving offenses are "serious" enough to warrant jury trials. *Compare Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966) (en banc) (jury trials for driving while intoxicated) *with State ex rel Dean v. City Court of Tucson*, 141 Ariz. 361, 687 P.2d 369 (Ariz. Ct. App. 1984) (no jury trials for reckless driving). Indeed, the Fifth Circuit has noted that of the twelve jurisdictions that have passed on the issue of whether drunk driving offenses are innately serious enough to warrant a jury trial apart from the penalties provided, four have responded positively and eight in the negative. *Landry v. Hoepfner*, 840 F.2d at 1219 n.39 (citations omitted). And, in contrast to petitioners' view that *both* reckless driving and driving while intoxicated are serious, we submit that *neither* of these offenses is "serious" in the jury trial context, absent exposure to a period of confinement in excess of six months. See *supra* at 16.

Amici A.C.L.U.'s attempt to define the "seriousness" of driving while intoxicated in terms of this Court's treatment of reckless driving in *Colts* also fails to consider the enactment of .10% *per se* laws in a large majority of states in the country. As noted by petitioners, the latest survey reveals that thirty-nine states and the District of Columbia now define drunk driving offenses not only in terms of the traditional physical impairment criteria, but also as driving with .10% or more by weight of alcohol in one's blood. This newer, alternative method of prosecuting drunk driving cases is separate and distinct from the more common form of proofs which focus upon a defendant's physical symptoms. More precisely, the effect, if any, upon a

person of the alcohol which that person has imbibed is wholly irrelevant to that individual's guilt or innocence, so long as the requisite percentage of alcohol is in the person's system. *See, e.g., Anderjeski v. City Court of Mesa*, 135 Ariz. 549, 663 P.2d 233, 234-235 (1983) (en banc) ("It is possible to have less than .10% blood alcohol content and still be under the influence of intoxicating liquor . . . . On the other hand, a person may have over .10 per cent blood alcohol content and still not have his driving abilities significantly impaired. . . ."); *State v. Abbott*, 15 Or. App. 205, 514 P.2d 355, 357 (1973) ("[T]he question is not whether they are intoxicated, but whether they have [the requisite percentage] of alcohol in their blood.") The emergence of .10% *per se* legislation is further indicative that drunk driving is not a *malum in se* offense.

Finally, the citation by *amici* A.C.L.U. and petitioners to the current strong emphasis on enforcement of drunk driving laws in the country, and on the efforts of national organizations such as M.A.D.D. and S.A.D.D., is also not dispositive of the issue before this Court. There is no doubt that drunk driving is the target of national condemnation. But the public's opinion of the gravity of certain illegal behavior does not mean that the offense is automatically "serious" for purposes of deciding whether its prosecution requires jury trials. As this Court has acknowledged, the concept of a "petty" offense is a term of art for constitutional purposes and does not mean that the offense or punishment is necessarily trivial:

> [T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six month's imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications. [*Baldwin v. New York*, 399 U.S. 66, 73 (1970)].

Thus, in classifying offenses as either "serious" or "petty," this Court was not fashioning a test which could be conclusively determined by resort to a public opinion poll. Rather, this Court established a conceptual boundary for "serious" crimes that would constitutionally mandate a jury trial. While petitioners' conduct of driving while intoxicated is by no means trivial, it is nevertheless a "petty" offense which does not entitle them to trial by jury.

Petitioners' invocation of "the existing laws and practices in the Nation" is no more supportive of their cause than is their reliance on the purported inherent "seriousness" of drunk driving. First, as this Court has recently demonstrated, in the context of evaluating the practices of various jurisdictions regarding the same issue, the Court is less concerned with numbers than with the question of whether the approach taken by even a small minority of states is constitutional. *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 1103 (1987), *reh'g denied* 107 S.Ct. 1913 (1987) (upholding as constitutional the requirement that defendant shoulder the burden of proving self-defense even though only two states in the country continue to adhere to this procedure); *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

Second, the statistics which have been paraded back and forth in this area have been terribly misleading. *Baldwin* itself only considered where in the range of penalties legislatively promulgated the states were drawing the jury trial line. *Baldwin* did not analyze national perception of an identical offense. Indeed, any comparison of various jurisdictions' treatments of the same offense is fraught with risk and unreliability; there are numerous variables contained in laws of different states which simply cannot be compartmentalized and accounted for when such a multi-jurisdictional measurement is made. *Rummel v. Estelle*, 445

U.S. 263, 279-281 (1980); *Solem v. Helm*, 463 U.S. 277, 308-309 (1983) (Burger, C.J., dissenting).

However, to the extent that this analysis is appropriate, it is clear that the numbers offered by petitioners are not supportive of their cause. Surely it is not enough simply to do as petitioners have done and make the general assertion that forty-six of fifty states grant jury trials to drunk drivers. To go only thus far does nothing to satisfy the more pertinent question of exactly under what circumstances jury trials are being provided in these forty-six states. Critical to this inquiry, and left unaddressed by petitioners, is a determination of the maximum penalties attendant to drunk driving offenses in the jurisdictions in which jury trials are allowed. If the possible term of imprisonment is, for example, six years (the maximum term available for a third offender in Nevada), then one need look no further than this Court's ruling in *Baldwin* to recognize that a jury trial is necessary. Only when a state's penalties for drunk driving are *below* the *Baldwin* six month threshold and jury trials are nevertheless provided would that jurisdiction's treatment of drunk driving become significant for purposes of petitioners' analysis.

Amicus State of New Jersey has therefore compiled a list of all jurisdictions which, by virtue of the attendant drunk driving penalties, are in complete conformity with the *Baldwin* rule in determining whether jury trials are warranted. (Appendix C). A second list examines the reasons for granting jury trials in those jurisdictions with drunk driving penalties below the *Baldwin* limit; specifically, an analysis is made as to whether each jurisdiction even recognizes *Baldwin's* "petty" versus "serious" distinction for *any* offense. (Appendix D). A review of the experience of other jurisdictions in this fashion discloses the following results.

Appellate courts in six states have refused to recognize a constitutional right to jury trials for first-offender drunk

drivers. (Appendix B). Of the forty-four remaining states, twenty-two which provide jury trials for first offenders have first-offender penalties *higher* than the *Baldwin* threshold. (Appendix C). Therefore, these jurisdictions are consistent with *Baldwin* and actually support the argument for application of the bright line rule.

The other twenty-two states grant jury trials for first-offender drunk driving cases even though the potential incarceration is below the *Baldwin* line. However, of these twenty-two jurisdictions, nineteen do not recognize *Baldwin's* "petty" versus "serious" distinction for *any* offense and, therefore, are completely useless in gauging these jurisdictions' views of the seriousness of drunk driving. (Appendix D). And only four states have made an affirmative determination that, independent of relevant penalties, drunk driving is innately a "serious" enough offense to warrant a jury trial. *Landry v. Hoepfner*, 840 F.2d at 1218 n.36. Two of these four states allow potential incarceration in excess of six months. *Id.*

Clearly, there is an absence of a national consensus as to just how "serious" or "petty" drunk driving actually is. Petitioners' blanket statement that "most states allow trial by jury in d.w.i. prosecutions" does not take into account the simple reality that a substantial percentage of these states conform with *Baldwin*'s bright line in doing so. Consequently, the "existing laws and practices of the Nation," *Duncan v. Louisiana*, 391 U.S. at 161, compel adherence to the bright line rule.

The arguments above demonstrate the deficiency of petitioners' complex "petty" versus "serious" offense test. Analysis of the additional factors which petitioners propose reveals that these factors provide no legitimate foundation for petitioners' jury trial demand. Consequently, even if this Court were not satisfied to limit the applicable rule to consideration of the maximum authorized term of incarceration, petitioners would not be entitled to trial by jury.

POINT IV

NEVADA HAS A LEGITIMATE STATE INTEREST IN BENCH TRIALS FOR PETTY OFFENSES.

Amici A.C.L.U. and, to a certain extent, petitioners, attempt to minimize Nevada's interest in not providing jury trials for first-offender drunk drivers by claiming that no state interest of constitutional magnitude exists to outweigh a defendant's constitutional right to trial by jury. Their claim is somewhat tautological; obviously, if petitioners are entitled to jury trials, then Nevada has no interest in foreclosing that entitlement. However, petitioners and *amici* A.C.L.U. underrate and oversimplify the value of Nevada's and, inferentially, other states' interests in bench trials for "petty" offenses. Regardless of whether this Court accepts our construction of its case law (Point I), accepts our arguments favoring the bright line rule (Point II), or agrees with our evaluation of other tests proffered by petitioners (Point III), it should definitely reaffirm the State's right to impose bench trials for "petty" offenses.

Whether or not they reach the level of being of constitutional import, financial costs and administrative burdens to the State are properly considered in the jury trial analysis. *Cf. Patterson v. New York*, 432 U.S. 197, 209 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). For example, in New Jersey, where jury trials have never been provided for drunk driving offenses, massive delays would undoubtedly result from the implementation of such a system. *Cf. In re Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 202 (2d Cir. 1987). See *supra* note 3. Such a large encumbrance upon a State's criminal justice system, particularly with respect to its attendant delays, directly impacts upon that State's obligation to provide all defendants with another constitutional right, *i.e.*, speedy trials. U.S. Const. amend. VI.

This Court should reaffirm its prior conclusion that whatever disadvantages exist for defendants in terms of the potential penalties they face, in situations where they are charged only with a "petty" offense, these disadvantages are outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. *Baldwin v. New York*, 399 U.S. 66, 73 (1970). Nevada's first-offender drunk driving offense is a "petty" offense, but, in any event, *amicus* State of New Jersey urges this Court to reject petitioners' minimization of the value of administrative burdens and financial costs in the "petty offense" analysis.

CONCLUSION

For the foregoing reasons, *amicus* State of New Jersey respectfully urges this Court to affirm the judgment of the Supreme Court of Nevada.

Respectfully submitted,

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APPENDIX

APPENDIX A

NEW JERSEY STATUTES, COURT RULES, AND CONSTITUTIONAL PROVISIONS CITED IN THIS BRIEF

A. NEW JERSEY STATUTES ANNOTATED

2A:8-21. Jurisdiction of specified offenses

Each municipal court, and the judge or judges thereof, shall have jurisdiction of the following offenses occurring within the territorial jurisdiction of the court:

a. Violations of the motor vehicle and traffic laws;

b. Violations of the fish and game laws;

c. Violations of the ordinances of the municipality wherein the municipal court is located or of the municipalities to which its jurisdiction extends;

d. Violations of disorderly persons offenses and petty disorderly persons offenses in Title 2C of the New Jersey Statutes or any other disorderly persons or petty disorderly persons offense as defined by the laws of this State;

e. Violations of chapters one and four of Title 44, Poor, of the Revised Statutes;

f. Violations of chapters six and seventeen of Title 9, Children, of the Revised Statutes; and

g. Offenses as to which no indictment by a grand jury is required.

2C:43-3. Fines and restitutions

A person who has been convicted of an offense may be sentenced to pay a fine, to make restitution, or both, such fine not to exceed:

a. $100,000.00, when the conviction is of a crime of the first or second degree;

b. $7,500.00, when the conviction is of a crime of the third or fourth degree;

c. $1,000.00, when the conviction is of a disorderly persons offense;

d. $500.00, when the conviction is of a petty disorderly persons offense;

• • •

2C:43-3.1. Additional penalties; collection and disposition by violent crimes compensation board; victim and witness advocacy fund; failure to pay; driver license privileges

• • •

(2)(a) In addition to any other disposition made pursuant to the provisions of N.J.S. 2C:43-2 or any other statute imposing sentences for crimes, any person convicted of any disorderly persons offense, any petty disorderly persons offense, or any crime not resulting in the injury or death of any other person shall be assessed a penalty of $30.00 for each such offense or crime for which he was convicted.

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2C:43-8. Sentence of imprisonment for disorderly persons offenses and petty disorderly persons offenses

A person who has been convicted of a disorderly persons offense or a petty disorderly persons offense may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall not exceed 6 months in the case of a disorderly persons offense or 30 days in the case of a petty disorderly persons offense.

17:29A-35. Merit rating accident surcharge for private passenger automobiles; plans; suspension of license; disposition of funds; amount of surcharge; rules and regulations

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(b)(2) Plan surcharges shall be levied for convictions (a) under R.S. 39:4-50 for violations occurring on or after February 10, 1983, and (b) under section 2 of P.L.1981, c. 512 (C. 39:4-50.4a), or for offenses committed in other jurisdictions of a substantially similar nature to those under R.S. 39:4-50 or section 2 of P.L.1981, c. 512 (C. 39:4-50.4a), for violations occurring on or after January 26, 1984. Surcharges under this paragraph shall be levied annually for a three year period, and shall be not less than $1,000 per year for each of the first two convictions, and not less than $1,500 per year for the third conviction occurring within a three year period. If a driver is convicted under both R.S. 39:4-50 and section 2 of P.L.1981, c. 512 (C. 39:4-50.4a) for offenses arising out of the same incident, the driver shall be assessed only one surcharge for the two offenses. The commissioner may increase the amount of surcharges as he deems necessary to effectuate the purposes of subsection d. of this section and P.L.1983, c. 65 (C. 17:29A-33 et al.), and may, pursuant to regulation, permit the deferral of all or any part of these surcharges as provided in paragraph (1)(a) of this subsection.

If, upon written notification from the Division of Motor Vehicles, mailed to the last address of record with the division, a driver fails to pay a surcharge levied under this subsection, the license of the driver shall be suspended forthwith until the surcharge is paid to the Division of Motor Vehicles; except that upon satisfactory show-

ing of indigency, the Division of Motor Vehicles may authorize payment of the surcharge on an installment basis over a period not to exceed 10 months.

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39:3-40. Driving when license refused, suspended, revoked or prohibited; motor vehicle license revoked; punishment

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

A person violating this section shall be subject to the following penalties:

a. Upon conviction for a first offense, a fine of $500.00;

b. Upon conviction for a second offense, a fine of $750.00 and imprisonment in the county jail for not more than five days;

c. Upon conviction for a third offense, a fine of $1,000.00 and imprisonment in the county jail for 10 days;

d. Upon conviction, the court shall impose or extend a period of suspension not to exceed six months;

e. Upon conviction, the court shall impose a period of imprisonment for not less than 45 days,

if while operating a vehicle in violation of this section a person is involved in an accident resulting in personal injury to another person.

Nothwithstanding subsections a. through e., any person violating this section while under suspension issued pursuant to R.S. 39:4-50, upon conviction, shall be fined $500.00, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days.

39:4-50. Operating or allowing operation by person under influence of liquor or drugs; penalties; alcohol education or rehabilitation; collection of driver's license; rights of discovery; intoxicated driver resource centers

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject:

(1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the

discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than six months nor more than one year.

(2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction, and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director, consistent with subsection (b) of this section.

(3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

If the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title at the time of any conviction for a violation of this section, the revocation or suspension period imposed shall commence as of the date of termination of the existing revocation or suspension period. A court that imposes a term of imprisonment under this section may sentence the person so convicted to the county jail, to the workhouse of the county wherein the offense was committed, to an inpatient rehabilitation program or to an Intoxicated Driver Resource Center or other facility approved by the Director of the Division of Alcoholism in the Department of Health; provided that for a third or subsequent offense a person shall not serve a term of imprisonment at an Intoxicated Driver Resource Center as provided in subsection (f).

A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

(b) A person convicted under this section must satisfy the screening, evaluation, referral program and fee requirements of the Division of Alcoholism's Intoxicated Driving Programs Unit, and of the Intoxicated Driver Resource Centers and a program of alcohol education and highway

safety, as prescribed by the Director of the Division of Motor Vehicles. The sentencing court shall inform the person convicted that failure to satisfy such requirements shall result in a mandatory two day term of imprisonment in a county jail and a driver license revocation or suspension and continuation of revocation or suspension until such requirements are satisfied, unless stayed by court order in accordance with Rule 7:8-2 of the N.J. Court Rules, 1969, or R.S. 39:5-22. Upon sentencing, the court shall forward to the Bureau of Alcohol Countermeasures within the Intoxicated Driving Programs Unit a copy of a person's conviction record. A fee of $80.00 shall be payable to the Alcohol Education, Rehabilitation and Enforcement Fund established pursuant to section 3, P.L.1983, c. 531 (C. 26:2B-32) to support the Intoxicated Driving Programs Unit.

(c) Upon conviction of a violation of this section, the court shall collect forthwith the New Jersey driver's license or licenses of the person so convicted and forward such license or licenses to the Director of the Division of Motor Vehicles. The court shall inform the person convicted that if he is convicted of personally operating a motor vehicle during the period of license suspension imposed pursuant to subsection (a) of this section, he shall, upon conviction, be subject to the penalties established in R.S. 39:3-40. The person convicted shall be informed orally and in writing. A person shall be required to acknowledge receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of R.S. 39:3-40. In the event that a

person convicted under this section is the holder of any out-of-state driver's license, the court shall not collect the license but shall notify forthwith the director, who shall, in turn, notify appropriate officials in the licensing jurisdiction. The court shall, however, revoke the nonresident's driving privilege to operate a motor vehicle in this State, in accordance with this section. Upon conviction of a violation of this section, the court shall notify the person convicted, orally and in writing, of the penalties for a second, third or subsequent violation of this section. A person shall be required to acknowledge receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of this section.

(d) The Director of the Division of Motor Vehicles shall promulgate rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.) in order to estabish a program of alcohol education and highway safety, as prescribed by this act.

(e) Any person accused of a violation of this section who is liable to punishment imposed by this section as a second or subsequent offender shall be entitled to the same rights of discovery as allowed defendants pursuant to the Rules Governing Criminal Practice, as set forth in the Rules Governing the Courts of the State of New Jersey.

(f) The counties, in cooperation with the Division of Alcoholism and the Division of Motor Vehicles, but subject to the approval of the Division of Alcoholism, shall designate and establish on a county or regional basis Intoxicated Driver Resource Centers. These centers shall have the

capability of serving as community treatment referral centers and as court monitors of a person's compliance with the ordered treatment, service alternative or community service. All centers established pursuant to this subsection shall be administered by a certified alcoholism counsellor or other professional with a minimum of five years' experience in treatment of alcoholism. All centers shall be required to develop individualized treatment plans for all persons attending the centers; provided that the duration of any ordered treatment or referral shall not exceed one year. It shall be the center's responsibility to establish networks with the community alcohol education, treatment and rehabilitation resources and to receive monthly reports from the referral agencies regarding a person's participation and compliance with the program. Nothing in this subsection shall bar these centers from developing their own education and treatment programs; provided that they are approved by the Division of Alcoholism.

Upon a person's failure to report to the initial screening or any subsequent ordered referral, the Intoxicated Driver Resource Center shall promptly notify the sentencing court of the person's failure to comply.

Required detention periods at the Intoxicated Driver Resource Centers shall be determined according to the individual treatment classification assigned by the Bureau of Alcohol Countermeasures. Upon attendance at an Intoxicated Driver Resource Center, a person shall be assessed a per diem fee of $50.00 for the first offender program or a per diem fee of $75.00 for the second offender program, as appropriate.

The centers shall conduct a program of alcohol education and highway safety, as prescribed by the Director of the Division of Motor Vehicles.

The Director of the Division of Alcoholism shall adopt rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.), in order to effectuate the purposes of this subsection.

39:4-50.8. Conviction for violation of § 39:4-50; surcharge; distribution

Upon a conviction of a violation of R.S. 39:4-50, the court shall collect from the defendant a surcharge of $100.00 in addition to and independently of any fine imposed on that defendant. The court shall forward the surcharge to the Director of the Division of Motor Vehicles who shall deposit $95.00 of the surcharge into a "Drunk Driving Enforcement Fund" (hereinafter referred to as the "fund"). This fund shall be used to establish a Statewide drunk driving enforcement program to be supervised by the director. The remaining $5.00 of each surcharge shall be deposited by the director into a separate fund for administrative expenses.

A municipality shall be entitled to periodic grants from the "Drunk Driving Enforcement Fund" in amounts representing its proportionate contribution to the fund. A municipality shall be deemed to have contributed to the fund the portion of the surcharge allocated to the fund, collected pursuant to this section if the violation of R.S. 39:4-50 occurred within the municipality and the arrest resulting in conviction was made by the member of a municipal police force. The grants from the fund shall be used by the municipality to increase enforcement of R.S. 39:4-

50 by subsidizing additional law enforcement patrols and through other measures approved by the director. The Division of State Police, interstate law enforcement agencies and county law enforcement agencies shall be entitled to periodic grants from the fund in amounts representing their proportionate contribution to the fund. The Division of State Police or county or interstate law enforcement agency shall be deemed to have contributed to the fund the portion of the surcharge allocated to the fund collected pursuant to this section if the arrest resulting in a conviction was made by a member of the Division of State Police or county or interstate law enforcement agency. The grants from the fund shall be used by the Division of State Police or county or interstate law enforcement agency to increase enforcement of R.S. 39:4-50 by subsidizing additional law enforcement patrols and through other measures approved by the director.

The surcharge described herein shall not be considered a fine, penalty or forfeiture to be distributed pursuant to R.S. 39:5-41.

The director shall promulgate rules and regulations in order to effectuate the purposes of this section.

B. NEW JERSEY COURT RULES

2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

(a) As of Right. Except as otherwise provided by *R.* 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts;

* * *

2:12-3. Certification of Final Judgments of the Appellate Division

(a) Notice of Petition for Certification: Time for Filing; Contents; Filing Fees. If certification is sought to review a final judgment of the Appellate Division, the petitioner shall, within 20 days after its entry, serve a copy of a notice of petition for certification upon all parties who may be affected by the proceeding and shall file, together with the payment to each court of the appropriate fee pursuant to *N.J.S.A.* 22A:2, the original notice with the Clerk of the Appellate Division and a copy thereof with the Clerk of the Supreme Court.

* * *

3:23-1. Exclusive Method of Review

Except as provided by *R.* 2:2-3(b), review of a judgment of conviction in a criminal action or proceeding in a court of limited criminal jurisdiction shall be by appeal as provided by *R.* 3:23.

3:23-8. Hearing on Appeal

(a) Plenary Hearing; Hearing on Record; Correction or Supplementation of Record; Transcript for Indigents. If a verbatim record or sound recording was made pursuant to *R.* 7:4-5 in the court from which the appeal is taken, the original transcript thereof duly certified as correct shall be filed by the clerk of the court below with the county clerk, and a certified copy served on the

prosecuting attorney by the clerk of the court below within 20 days after the filing of the notice of appeal or within such extension of time as the court permits. In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a substantially unintelligible record or that the rights of defendant were prejudiced below in which event the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury. The Court shall provide the municipal court with reasons for the remand. The Court may also supplement the record and admit additional testimony whenever (1) the municipal court erred in excluding evidence offered by the defendant, (2) the state offers rebuttal evidence to discredit supplementary evidence admitted hereunder, or (3) the record being reviewed is partially unintelligible or defective. If the appellant, upon application to the court appealed to, is found to be indigent, the court shall order the transcript of the proceedings below furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance. If no such record was made in the court from which the appeal is taken, the appeal shall operate as an application for a plenary trial de novo without a jury in the court to which the appeal is taken.

* * *

(e) Disposition by Superior Court, Law Division. If the defendant is convicted, the court shall impose a sentence as provided by law. If the defendant is acquitted, the court shall order the defendant discharged, the conviction in the court

below set aside, and the return of all fines and costs paid by the defendant. An appropriate judgment shall be entered and a copy thereof transmitted to the court below.

* * *

7:6-1. Complaint and Summons

(a) Form. In cases involving violations of statutes or ordinances relating to the operation or use of motor vehicles, hereinafter designated as "traffic offenses," the complaint and summons shall be a uniform traffic ticket in the form prescribed by the Administrative Director of the Courts. On a complaint and summons for a nonmoving traffic offense, in lieu of the name of the defendant it shall be sufficient to set forth the license number of the vehicle involved, and it shall be presumed that the owner of the vehicle is the defendant charged with the violation.

(b) Issuance. The complaint may be made and signed by a law enforcement officer, or by any other person, but the summons shall be signed and issued only by such officer, or the judge, clerk or deputy clerk of the court in which the complaint is, or is to be filed. *R.* 7:3 relating to warrants and summons in respect of nonindictable offenses generally, shall be applicable to cases involving a traffic offense, except as otherwise herein provided.

* * *

C. NEW JERSEY CONSTITUTIONAL PROVISIONS

New Jersey Constitution (1947), Art I, para. 10 Rights of persons accused of crime

10. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

APPENDIX B

STATES THAT DO NOT RECOGNIZE A CONSTITUTIONAL RIGHT TO JURY TRIALS FOR FIRST OFFENSE DRUNK DRIVING.

1. *Florida*: Fla. Stat. Ann. § 316.193(2)(a) 2.a (West Supp. 1988) (first offense driving under the influence subject to imprisonment for not more than six months); *Whirley v. State*, 450 So.2d 836, 839 (Fla. 1984) (person charged with driving with unlawful blood alcohol level has been charged with a "petty offense" and is not entitled to trial by jury under Federal or State Constitutions). *But see State v. Heidrich*, 490 So.2d 1306 (Fla. App. 1986) (Court of Appeals calling into question the continued vitality of *Whirley*, *supra*, in light of subsequent legislative action).

2. *Louisiana*: La. Rev. Stat. Ann. § 14:98.B (West 1986) (authorized maximum period of six months' imprisonment for first offense driving while intoxicated); *City of Monroe v. Wilhite*, 255 La. 838, 233 So.2d 535, 536, *cert. denied* 400 U.S. 910 (1970) (defendant charged with driving automobile under the influence of alcohol not entitled to jury since offense was "petty"); *State v. Landry*, 463 So.2d 761 (La. App. 1985), *cert. denied* 464 So.2d 1373 (La. 1985); *Landry v. Hoepfner*, 840 F.2d 1201 (5th C. 1988) (*en banc*) (where defendant's sentencing exposure was limited to six months and $500, defendant not entitled to trial by jury).

3. *Nevada*: Nev. Rev. Stat. Ann. § 484.3792(1)(a)(2) (Supp. 1988) (first offender drunk driver subject to six months' imprisonment); *Blanton v. North Las Vegas Municipal Court*, 103 Nev. 135, 748 P.2d 494 (1987), *cert. granted*, 108 S.Ct. 2843 (1988).

4. *New Hampshire*: N.H. Rev. Stat. Ann. § 265:82-b (Supp. 1981) (no authorized period of imprisonment); *State v. Morril*, 123 N.H. 707, 465 A.2d 882, 886 (N.H. 1983) (so long as a fine of no more than $500 may be levied against first offense drunk driver, no right to trial by jury).

5. *New Mexico*: N.M. Stat. Ann. § 66-8-102(D) (Supp. 1988) (imprisonment of no more than ninety days); *Hamilton v. Walker*, 65 N.M. 470, 340 P.2d 407 (1959) (no constitutional right to jury trial in drunk driving prosecution).

6. *New Jersey*: N.J. Stat. Ann. § 39:4-50(a)(1) (West 1973 & Supp. 1988) (first offenders subject to potential imprisonment of thirty days); *State v. Rodgers*, 91 N.J.L. 212, 102 A. 433 (E. & A. 1917) (no right to trial by jury); *State v. Linnehan*, 197 N.J. Super. 41, 484 A.2d 34 (App. Div. 1984), *certif. denied* 99 N.J. 236, 491 A.2d 723 (1985); *State v. Zoppi*, 196 N.J. Super. 596, 483 A.2d 844 (Law Div. 1984).

APPENDIX C

STATES IN WHICH THE MAXIMUM AUTHORIZED PERIOD OF CONFINEMENT FOR FIRST OFFENSE DRUNK DRIVING EXCEEDS THE *BALDWIN* THRESHOLD.

1. *Alabama*: Ala. Code § 32-5A-191(c) (1983 & Supp. 1987) (imprisonment in county or municipal jail for not more than one year).
2. *Alaska*: Alaska Stat. § 28.35.030(b) (1984) (drunk driving is a Class A misdemeanor); Alaska Stat. § 12.55.135(a) (1984) (class A misdemeanor punishable by a term of imprisonment not to exceed one year).
3. *Arkansas*: Ark. Stat. Ann. § 5-65-103 (1987); Ark. Stat. Ann. § 5-65-111(a) (1987) (imprisonment not to exceed one year).
4. *Colorado*: Colo. Rev. Stat. § 42-4-1202(1)(a), (b),-(1.5)(a), - (4)(a)(I) (1984) (punishment in the county jail for not more than one year).
5. *Georgia*: Ga. Code Ann. § 40-6-391(c)(1)(B) (1985 & Supp. 1988) (imprisonment for not more than one year).
6. *Illinois*: Ill. Ann. Stat. Ch. 95 1/2, § 11-501 (4) (c) (1988-1989 Supp.) (drunk driving is a Class A misdemeanor); Ill. Ann. Stat. Ch. 38, § 1005-1, 1005-8-3 (1983) (range of appropriate dispositions).
7. *Indiana*: Ind. Code Ann. § 9-11-2-2 (Burns 1988 Supp.) (drunk driving is a Class A misdemeanor); § 35-50-3-2 (1985) (Class A misdemeanor punishable by imprisonment of not more than one year).
8. *Iowa*: Iowa Code Ann. § 321J.2(2)(a) (West Supp. 1988) (DWI is a Serious Misdemeanor); Iowa Code Ann. § 903.1 (West 1979 & Supp. 1988) (punishable by imprisonment of not more than one year).
9. *Maine*: Me. Rev. Stat. Ann. tit. 29, § 1312-B(2) (Supp. 1987) (Class D crime requiring incarceration of not less than forty-eight consecutive hours); Me. Rev. Stat. Ann. tit. 17A, § 1252 (2)(D)(1964 & Supp. 1987) (im-

prisonment of up to one year prescribed for Class D crimes).

10. *Maryland*: Md. Transp. Code Ann. § 21-902(a) (1987) (drunk driving); § 27-101(h)(l) (first offense drunk driving subject to imprisonment of not more than one year).
11. *Massachusetts*: Mass. Gen. Laws Ann. ch. 90, § 24(1)(a)(1) (West 1985) (first offense drunk driving punishable by imprisonment of not more than two years).
12. *New York*: N.Y. Vehicle and Traffic Law § 1192(2),(3),(5) (McKinney 1986 & Supp. 1988) (drunk driving subject to imprisonment of not more than one year).
13. *Oklahoma*: Okla. Stat. Ann. tit. 47, § 11-902(c) (West 1988) (incarceration in county jail for not more than one year).
14. *Oregon*: Or. Rev. Stat. § 813.010(3) (1985) (driving while intoxicated is a Class A misdemeanor); Or. Rev. Stat. § 161.615 (1985) (Class A misdemeanors punishable by maximum term of one year imprisonment).
15. *Pennsylvania*: 75 Pa. Cons. Stat. Ann. § 3731(e)(1) (1988 Supp.) (first offense driving while intoxicated is a second degree misdemeanor); 18 Pa. Cons. Stat. Ann. § 106(b)(7) (authorized term of imprisonment of not more than two years).
16. *Rhode Island*: R.I. Gen. Laws § 31-27-2(d)(1) (Supp. 1987) (first offender drunk driver may be imprisoned for up to one year).
17. *South Dakota*: S.D. Codified Laws Ann. § 32-23-2 (1984 & Supp. 1988) (first offense driving while intoxicated is a Class 1 misdemeanor); S.D. Codified Laws Ann. § 22-6-2 (1988) (Class 1 misdemeanor punishable by imprisonment of up to one year).
18. *Tennessee*: Tenn. Code Ann. § 55-10-403(a)(1) (1980 & Supp. 1987) (first offenders subject to imprisonment in county jail for up to eleven months and twenty-nine days).

19. *Texas*: Tex. Rev. Civ. Stat. Ann. art. 6701l-1 (Vernon Supp. 1988) (first offenders subject to confinement in county jail for not more than two years).
20. *Vermont*: Vt. Stat. Ann. tit. 23, § 1210 (1987) (imprisonment of up to one year).
21. *Virginia*: Va. Code Ann. § 18.2-270 (1988) (driving while intoxicated is a Class one misdemeanor); Va. Code Ann. § 18.2-11 (Class one misdemeanor punishable by imprisonment in county jail for up to twelve months).
22. *Washington*: § 46.61.515(1) (1987) (first offense driving while intoxicated subject to imprisonment of up to one year).

APPENDIX D

STATES WHICH PROVIDE JURY TRIALS FOR FIRST OFFENSE DRUNK DRIVING FOR WHICH THE AUTHORIZED TERM OF CONFINEMENT IS LESS THAN THE *BALDWIN* THRESHOLD

STATE	RECOGNIZES *BALDWIN's* DISTINCTION BETWEEN "PETTY" and "SERIOUS" OFFENSES	SOURCE
1. Arizona	Yes	*Rothweiler v. Superior Court of Pima County*, 100 Ariz. 37, 410 P.2d 479, 482, 486 (1966) (en banc) (right to trial by jury not applicable to "petty" offenses, but drunk driving is a "serious" offense).
2. California	No	*Tracy v. Municipal Court*, 22 Cal.3d 760, 587 P.2d 227, 150 Cal. Rptr. 785 (Cal. 1978) (en banc) (defendant charged with possession of marijuana had right to trial by jury even though offense punishable by only $100 fine); *Mills v. Municipal Court*, 10 Cal.3d 383, 515 P.2d 273, 110 Cal. Rptr. 329 (Cal. 1973) (en banc); Cal. Penal Code § 689 (West 1985).
3. Connecticut	No	Conn. Gen. Stat. Ann. § 54-82b(a) (West Supp. 1988) (no right to trial by jury in criminal actions where maximum penalty is a fine of $199.00).
4. Delaware	Yes	*Thomas v. State*, 331 A.2d 147, 150 (Del. 1975) (potential incarceration for more than six months is the fixed dividing line between "petty" and "serious" crimes). See also *Clements v. Family Court*, 401 A.2d 72, 74 (Del. 1979).
5. Hawaii	Yes	*State v. O'Brien*, 68 Haw. 39, 704 P.2d 883 (Haw. 1985) (driving under influence is constitutionally "serious" offense and defendant so charged has right to trial by jury).
6. Idaho	No	*State v. Bennion*, 112 Idaho 32, 730 P.2d 952, 964 (Idaho 1986) (State constitution guarantees jury trial whenever the possible sanction includes imprisonment).

7. Kansas	No	Kan. Stat. Ann. § 22-3404 (Supp. 1987) (defendant may demand jury trial in misdemeanor and traffic infraction cases); *State v. Dickson*, 9 Kan. App.2d 425, 680 P.2d 313, 314 (Kan. App. 1984).
8. Kentucky	No	Ky. Rev. Stat. Ann. § 29A.270(1)(Mitchie/Bobbs-Merrill 1985) (defendants entitled to trial by jury in all criminal prosecutions, including prosecutions in the circuit and district courts); *Crone v. Commonwealth*, 680 S.W.2d 138, 139 (Ky. Ct. App. 1984).
9. Michigan	No	*People v. Anschutz*, 335 Mich. 375, 56 N.W.2d 224 (1953)(recognizing right to jury trial in prosecution for misdemeanor of providing alcohol to minor); *People v. Schomaker*, 116 Mich. App. 507, 323 N.W. 2d 461 (1982) (constitution guarantees right to trial by jury in all criminal prosecutions).
10. Minnesota	No	*Peterson v. Peterson*, 278 Minn. 275, 153 N.W.2d 825 (Minn. 1967) (State constitution confers right to jury trial in all cases, regardless of gravity).
11. Mississippi	No	*Clark v. State*, 332 So.2d 415 (Miss. 1976) (Mississippi Code sec. 9-9-33 accords to all parties in county court—except in contempt cases—a jury trial when timely demanded and not otherwise waived).
12. Missouri	No	*State v. McClinton*, 418 S.W.2d 55, 60 (Mo. 1967)(en banc) ("since 1870 at least, the defendant in a misdemeanor case has had a statutory right to trial by jury"). *But cf. State ex rel. Cole v. Nigro*, 417 S.W.2d 933, 936 (Mo. 1971) (en banc) (no constitutional right to trial by jury in municipal ordinance cases, but statutory right to trial by jury in third and fourth class cities).
13. Montana	No	*State v. Waymire*, 736 P.2d 106, 107 (Mont. 1987)(appeals from district courts and city courts must be tried anew before a jury); *Hammer v. Justice Court, Lewis and Clark County*,

		720 P.2d 281, 283 (Mont. 1986) (justice courts have jurisdiction over misdemeanors punishable by up to six months).
14. Nebraska	No	*State v. Karel*, 204 Neb. 573, 284 N.W.2d 12, 13 (Neb. 1979) (defendant charged with first offense drunk driving entitled to trial by jury under Neb. Rev. Stat. § 24-536, which accords right to jury in all cases except traffic infractions and criminal cases arising under city or village ordinances).
15. North Carolina	No	*State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189, 192 (N.C. 1971), *aff'd o.g.* 281 N.C. 100 187 S.E. 2d 756 (1972) *cert. denied* 414 U.S. 1160 (1974) (misdemeanors—even petty misdemeanors—initially tried without jury, but defendants afforded trial *de novo* with jury on appeal).
16. North Dakota	No	N.D. Cent. Code § 29-16-01 (1974) (an "issue of fact" arises upon a plea of not guilty); § 29-16-02 (all issues of fact must be tried by jury—whether misdemeanor or felony—unless jury trial waived).

17. Ohio	No	Ohio Rev. Code Ann. § 2945.17 (Page 1987) (accused has right to trial by jury in all cases in which the penalty involved exceeds $100).
18. South Carolina	No	*United States v. Jenkins*, 780 F.2d 472, 474-475 (4th Cir.), *cert. denied* 476 U.S. 1161 (1986) (state statutory right to trial by jury applies to all offenses within magistrate's jurisdiction).
19. Utah	No	*Salt Lake City v. West Gallery, Inc.*, 573 P.2d 1283 (Utah 1978) (criminal cases initiated in district courts entitle defendants to twelve, eight or a lesser number of jurors depending on gravity of offense; a jury of four is provided in criminal cases in City and Justice of the Peace Courts); *State v. Nuttall*, 611 P.2d 722, 724-725 (Utah 1980) (jury of four constitutional for purpose of trying misdemeanor drunk driving offense).
20. West Virginia	No	*Scott v. McGhee*, 324 S.E.2d 710 (W. Va. 1984) (in municipal courts of West Virginia, right to jury trial accorded for both felonies and mis-

		demeanors when the penalty provides for any period of confinement).
21. Wisconsin	No	*State ex rel. Murphy v. Voss*, 34 Wis. 501, 149 N.W.2d 595, 597 (Wis. 1967) (under art. I, § 7 of the Wisconsin Constitution, all defendants are entitled to impartial jury trial, which right extends to the trial of misdemeanors). See also *State v. McAllister*, 107 Wis.2d 532, 319 N.W.2d 865 (Wis. 1982).
22. Wyoming	No	*Brenner v. City of Casper*, 723 P.2d 558 (Wyo. 1986) (crime punishable by *any* jail time is a "serious" offense subject to right to trial by jury pursuant to State constitution).